IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 24, 2008

MARTY W. THOMAS v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Hamilton County
No. 256446 Don W. Poole, Judge

No. E2007-02000-CCA-R3-PC - Filed August 14, 2008

A Hamilton County jury found the Petitioner, Marty W. Thomas, guilty of four counts of aggravated rape and one count of aggravated burglary. The trial court sentenced him to fifty-four years of incarceration. The Petitioner appealed, and this Court affirmed the judgments. The Petitioner then brought a post-conviction petition claiming that he received the ineffective assistance of counsel at his trial. The post-conviction court denied relief, and the Petitioner now appeals. After a thorough review of the record and the applicable law, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Brandon D. Raulston, Chattanooga, Tennessee, for the Petitioner, Marty W. Thomas.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel West Harmon, Assistant Attorney General; William H. Cox, III, District Attorney General; Jason Thomas, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

This Court summarized the facts of this case on direct appeal:

> In the early morning hours of February 26, 2000, the victim and her five-year-old son were asleep in her bed when she was awakened "by someone shoving [her] right shoulder." The intruder placed his gloved hands into the victim's mouth and told her not to scream or he would kill her and her son. At that time, the victim's son awoke and began screaming. The intruder ordered the victim to cover her son. The victim complied, and the child stopped screaming. However, the victim continued to scream, resulting in the intruder placing a pillow over her face.
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> The intruder used an unknown object to rip the victim's nightgown and expose her breasts. He placed his mouth on her breast and forced her to masturbate. The intruder then performed cunnilingus on the victim. When he finished, the intruder forced the victim to stand and he "brushed up against [her]." He told the victim that there were other persons downstairs who "were going to do the same thing to [her]." He then rummaged through one of the victim's dresser drawers until he found a pair of black pantyhose. He ordered the victim to sit on his lap and put on the pantyhose.
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> When the victim finished putting on the pantyhose, the intruder forced her to perform oral sex on him. He then ordered the victim to her knees. The victim testified at trial that when the intruder ordered her to her knees, she believed she was going to die. The intruder ripped the crotch of the victim's pantyhose with an unknown object and demanded that she "turn over." As the victim "turn[ed] over," she observed two screwdrivers laying on the chest-of-drawers. The intruder penetrated the victim vaginally. However, upon determining that vaginal intercourse was "not right," the intruder told the victim to turn over and he penetrated her anally. According to the victim, "that's whenever he finished."
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> Once the intruder had "finished," he ordered the victim to stand. The victim pleaded, "Don't kill me. Don't kill me." The intruder told the victim to face the bed and remove the pantyhose. The victim complied. The intruder then ordered her to lie on the bed underneath the covers. The intruder collected the victim's nightgown and pantyhose and left the apartment.
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> Once the victim was certain that the intruder had left, she went downstairs and called 911. Downstairs, the victim observed an open door which she assumed the intruder had used to enter and exit the apartment. However, when the police arrived, they informed the victim that a screen had been removed from one of the

living room windows and the window was broken. Shortly thereafter, the victim was taken to the "Rape Crisis Center" where rape kit testing was performed. The victim testified that she had abrasions around her mouth where the intruder had put his gloved hands.

At trial, the victim testified that she did not know her assailant, nor was she able to make a positive identification when shown photographic lineups of suspects. She related that at the time of the offenses her bedroom was dark with limited light coming through her bedroom door from the hallway. Moreover, the intruder prevented her from looking at him by covering her eyes and threatening her. However, when the intruder initially awakened her, she was able to note certain features, such as a dark moustache, a receding hairline, a pointed nose, blue jeans, and a long jacket. The police used this information to prepare a composite of her assailant. At trial, the victim noted that the appellant bore the features of her assailant.

Chattanooga Police Officer Mark Shelton testified that at approximately 6:14 a.m. on February 26, 2000, he was dispatched to the victim's townhouse at the Morrison Springs Apartments. The victim reported that she had been raped. Upon investigation, Officer Shelton discovered what appeared to be the "point of entry," a living room window. Officer Shelton went outside to investigate. He observed that the screen was missing, the window was "slightly ajar and ... there was [evidence of] some force to it."

Investigator Timothy Commers of the Chattanooga Police Department's Crime Scene Unit testified that on February 26, 2000, he was called to assist in the investigation of a rape at the Morrison Springs Apartments. As he photographed the exterior of the victim's townhouse, he observed that a window screen was missing from one of the living room windows. He further observed that "the upper section of that window . . . had cracked glass . . . very near the center of the window, and [there were] pry marks on the lower section of the window toward the right side of the frame." Investigator Commers testified that the pry marks appeared to have been made by some type of tool, possibly a screwdriver. Later that morning, officers discovered the missing screen in an overgrown thicket approximately three hundred feet from the victim's townhouse. Investigator Commers took the screen into evidence and processed it for prints.

Investigator Edwin Duke, a latent print examiner with the Chattanooga Police Department, testified that he received a court order to compare photographs of the prints on the window screen with the fingerprints of the appellant. Investigator Duke obtained prints of the appellant's fingers and palms. The print of the appellant's right

palm matched that of a palm print found on the window screen. Special Agent Oakley W. McKinney, a forensic scientist with the Tennessee Bureau of Investigation ("TBI"), also compared the appellant's prints with photographs of the prints on the window screen. At trial, Special Agent McKinney testified that latent prints from the window screen matched prints of the appellant's right middle finger and right palm.

Mary Katherine Spada testified that she was employed as a nurse at the Sexual Assault Resource Center, also known as the Rape Crisis Center. On February 26, 2000, she examined the victim in the instant case. Spada noted abrasions on the victim's face, which abrasions the victim claimed had been caused by her assailant placing his gloved hands over her mouth. Because the victim claimed to have been vaginally and anally raped, Spada obtained vaginal and anal swabs. She also obtained an oral swab. Spada placed the swabs and the victim's panties in a rape kit, which she sealed and gave to police.

An audiotape of the prior sworn testimony of Detective Larry Swafford, who was deceased at the time of trial, was played for the jury. Detective Swafford testified that he was present when a sample of the appellant's blood was obtained, which sample was subsequently sent to the TBI crime laboratory. Qadriyyah Pillow Debnam, a serologist and DNA analyst with the TBI crime laboratory, testified at trial that she extracted DNA from the appellant's blood samples and obtained a DNA profile. She compared the appellant's DNA profile with the unknown profile obtained from the victim's rape kit. Debnam "found that [the appellant's] profile was the same as what was inside the kit." Debnam testified that the statistical probability of another individual having the same profile as the appellant was one in eighty-six trillion.

Sergeant Kenneth D. Phillips with the Chattanooga Police Department's Automated Fingerprint Identification Section testified that upon the request of the State, he returned to the crime scene to determine whether the window screen could have been removed from outside the apartment. Sergeant Phillips related that, although the screen was designed to be removed from the inside, he was able to remove it from outside the townhouse by inserting his fingernails under the screen, lifting the screen, and pulling it out. Sergeant Phillips did not use a screwdriver to remove the screen.

The appellant's grandmother and mother testified on behalf of the appellant at trial. Mary Alice Slaven, the appellant's seventy-three-year-old grandmother, testified that the appellant lived with her at the time of the offenses. Slaven recalled that on the evening of February 25, 2000, the appellant returned home from work, watched television, and fell asleep on the recliner in the living room. The next

morning, she and the appellant went to church to have their photographs taken. According to Slaven, the appellant did not leave the house during the night. She explained that she was a light sleeper, and she had slept on the couch in the living room that night. She insisted that she would have awakened if the appellant had started his truck, which was parked near the house.

Diane Johnson, the appellant's mother, testified that at the time of the offenses the appellant was separated from his wife and was living with his grandmother. Johnson stated that she had telephoned Mrs. Slaven's house on the morning of February 26, 2000, to tell the appellant to shave for the photographs. Johnson identified the photographs taken that day and the receipt for the photographs, which she had dated February 26, 2000. She testified that the photograph of the appellant represented the way the appellant appeared on that date. The photograph reflected that the appellant had a moustache and a receding hairline. Johnson admitted that she did not know where the appellant was at 5:30 a.m. on the morning of the offenses.

State v. Marty William Thomas, No. E2003-00829-CCA-R3-CD, 2004 WL 1592816, *1-3 (Tenn. Crim. App., at Knoxville, Jul. 16, 2004), *perm. app. denied* (Tenn. Dec. 20, 2004).

B. Post-Conviction Hearing

At the post-conviction hearing, the following evidence was presented: The Petitioner testified that he was sentenced to fifty-four years and that he proceeded to trial because he thought he would get a more favorable sentence than the prosecutor's offer of twenty-five years. The Petitioner also stated that he thought twenty-five years was the maximum sentence for which he was eligible. He admitted that the most compelling evidence against him included the fingerprints found at the crime scene and the DNA evidence obtained during the investigation. The Petitioner said his trial counsel filed a motion to obtain an expert, but the Petitioner also testified later in the hearing that he did not know whether the motion was heard or even filed. He also said that Counsel briefly discussed hiring a DNA expert but did not pursue it. The Petitioner stated that Counsel hoped the probability ratio used in DNA identification would create reasonable doubt for the jury.

The Petitioner also testified that there were issues with the jury members during his trial. Before and during his trial, there was publicity about his case on the "radio, tv, [and] newspapers." One juror admitted during individual voir dire that she had heard about the case on the radio. The Petitioner also said, "There was another male juror [who] said that he heard by report that [the Petitioner] had been accused of a rape before or attempted rape, something to that effect. He was eventually excused." In addition, the Petitioner related that Juror Tina Maynard knew him because she lived a street over from him. Specifically, the Petitioner testified:

> Well, at trial I hadn't [seen] her, I guess at that time, in two years, used to seeing her with black hair. She had it cut real short, above her shoulders, and had it dyed. I mean I recognized the name, I told [Counsel] I recognized the name, but he said he didn't think she was from the mountain. . . .

He then admitted that Maynard never "indicate[d] that she knew [him]." The Petitioner said he never discussed a sequestered jury with Counsel.

The Petitioner testified that Counsel failed to meet with him and discuss crucial topics. The Petitioner acknowledged that Counsel met with him about four times, but then he said he was not sure about the total number of times they had met. Additionally, he said he did not speak to Counsel between the verdict and sentencing phases of the trial. The Petitioner said that, as a result, he did not know about enhancement factors and which ones would be used to enhance his sentence. Specifically, the Petitioner said he did not know that his prior convictions would be used against him or that a prior victim would testify against him. The Petitioner admitted that Counsel objected to the victim's statement, but said Counsel did not raise the issue on appeal. The Petitioner acknowledged that Counsel objected to each enhancement factor the trial court referenced. The Petitioner also said he did not know the court could order him to serve consecutive sentences. The Petitioner said Counsel did object to the order for consecutive sentences during the sentencing hearing, but he did not raise the issue on appeal. Moreover, the Petitioner said Counsel also objected to, but did not appeal, the expert qualifications of Edwin Duke, the State's latent fingerprint expert witness. Additionally, the Petitioner testified that he felt entitled to relief under *Blakely v. Washington*[1] and should not have his case decided pursuant to *State v. Gomez*[2] alone because he raised his appeal before the Tennessee Supreme Court ruled on *Gomez*.

On cross-examination, the Petitioner acknowledged that Counsel presented him with the prosecutor's offer of a twenty-five year sentence in exchange for a guilty plea. The Petitioner explained that he rejected it because he did not know he could be sentenced to serve more time if he went to trial. He stated that he understood he had been charged with five Class A felonies, with each felony potentially carrying a fifteen to twenty-five year sentence, but he thought that, because the felonies developed out of the same event, the sentences would be concurrent. The Petitioner also discussed that he used an alibi defense at trial; he said he considered using a physical impossibility defense, but chose against it. Finally, the Petitioner stated that he filed a motion to have Counsel withdraw from his case, but he did not proceed with that motion because Counsel assured the Petitioner he would be available more often for discussions about the case.

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[1] 542 U.S. 296 (2004).

[2] 239 S.W.3d 733, 740 (Tenn. 2007).

Counsel testified that he represented the Petitioner on this case and had represented other clients on similar matters before. Counsel explained that he did not obtain a DNA and fingerprint expert as a tactical decision:

> I talked to a few experienced lawyers who had handled DNA cases before, I did a lot of research myself on DNA to prepare for cross-examination, and I felt like after doing that research and that discussing the case with other senior lawyers, that I couldn't put somebody on the stand to say, to refute the evidence, so I felt it was tactical reasons I didn't do it.

Counsel also stated that he discussed the "possibility" of consecutive sentencing, and the merits of the plea offer:

> I know and I remember discussing the seriousness of the case with [the Petitioner], the factual basis of the case. I remember discussing with him what was going to be presented to a jury. I remember advising him that consecutive sentencing in this case would be a possibility, if not a reality, if he was convicted.
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> From the very beginning, [the Petitioner] was adamant that he was innocent in the case and never entertained an offer. Whenever I did mention an offer in the case or we discussed the possibility of me going to the district attorney to discuss an offer in the case, he would have no part of it because he was adamant that he was innocent and did not commit this crime.

Counsel then testified that he "[did] not recall" during the pre-trial voir dire any jurors admitting having prior knowledge about the case. He then said, "Certainly no one that stayed on the jury admitted to knowing about the case," referencing the individual voir dire. Counsel said two jurors admitted hearing about the case on the radio while driving into court to report for duty; one juror was subsequently excused.

Counsel testified that the Petitioner also filed a pro se motion to remove him from the case but did not pursue it. Counsel stated that despite their joint efforts to choose a jury, the Petitioner never informed him that a juror knew him and lived in his neighborhood. Counsel assured the post-conviction court that, had he known this information about the juror, he would have raised it as an issue with the trial court. Counsel explained that he did not appeal the sentence because he was afraid the State would then also appeal that issue, and the Petitioner would receive a longer sentence. Counsel said he did not appeal the issue of Edwin Duke's qualifications as an expert "[b]ecause [he] felt it was not a legitimate argument and it had no merit." Counsel felt Duke had gained more expertise since Counsel previously encountered him at a different trial. Counsel also said that he

discussed the Petitioner's presentence investigation report with him before the sentencing hearing, and he does not remember objecting to it during the sentencing hearing.

On cross-examination, Counsel said he met with the Petitioner more than three times. He also remembered the Petitioner decided to use the alibi defense that he was with his grandmother the night of the crime, as opposed to the physical impossibility defense. Counsel also stated that there were palm prints on a window screen at the crime scene where the perpetrator removed the screen to gain entry to the victim's apartment. Also, the DNA from sperm collected from multiple points on the victim's body matched the Petitioner's DNA. Counsel said that on cross-examination he attacked the DNA evidence as an unreliable source of evidence. Additionally, he felt there was a solid chain of custody dealing with the DNA evidence, so that could not be attacked successfully. Counsel objected to the use of Detective Larry Swafford's testimony from the preliminary hearing, but the trial court overruled the objection. Pertaining to the Petitioner's grandmother as his alibi witness, Counsel testified that her credibility was "destroy[ed]" at trial. Counsel also considered his decision not to ask for a sequestered jury "a tactical decision." Counsel said he explained to the Petitioner that he could be ordered to serve up to twenty-five years on each of the four counts of aggravated rape and three to six years on the burglary. Counsel felt the Petitioner was going to receive seventy-five to one hundred years based on the judge and the crime. Counsel said he only raised on appeal the issues that he felt had merit.

Sara Baggett was the Petitioner's neighbor. She said she recognized Maynard on the jury because their daughters played together. Baggett said that the Petitioner had been in the presence of Maynard's daughter, and Maynard knew the Petitioner. On cross-examination, Baggett said the local paper wrote about the case before and during the trial. She did not recall if the judge instructed jurors about the publicity. Baggett admitted that she never approached Counsel to inform him that Maynard knew the Petitioner. Diane Johnson, the Petitioner's mother, testified that she told Counsel that Maynard knew the Petitioner and was on his jury. On cross-examination, she said she did not know if the Petitioner knew Maynard. Counsel was called back to the witness stand and testified that he did not remember much about Maynard, but he said she would have been included in the discussion for a fair and impartial jury.

After hearing the evidence presented, the Court denied the petition for post-conviction relief. It is from that judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner alleges that he did not receive the effective assistance of counsel because Counsel failed to: (1) raise the issue that a juror knew the Petitioner; (2) request that the jury be sequestered; and (3) consult with experts on fingerprinting and DNA evidence. The State counters that the Petitioner did not show deficient representation or prejudice. We agree with the State.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "In considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy

and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

1. Juror Tina Maynard

The Petitioner claims Counsel was ineffective for failing to raise the issue with the trial court that Juror Tina Maynard knew the Petitioner from being his neighbor. The trial court found that the Petitioner failed to prove that he suffered prejudice due to Maynard being on his jury:

> The petitioner alleges that counsel did not challenge the juror who did not disclose that she was a close neighbor. He testified that, though the juror's name was familiar, he did not immediately recognize her because of her hairstyle. When he mentioned her to counsel, however, counsel reassured him that she was not "from the mountain." His mother testified that her daughter, his sister, told her that the juror was a neighbor and that she, the mother, so informed counsel. Counsel denied that he was ever informed that the juror lived in the same neighborhood as the petitioner. According to the pre-sentence investigation report, the petitioner's residence was 4103 Taft Highway, Signal Mountain, and the scene of the offenses was an apartment at 701 Morrison Springs Road. According to the list of jury panels, the address of the juror, Ms. Maynard, was 3006 Edwards Point Road, Signal Mountain. The petitioner did not call Ms. Maynard to testify or explain his failure to do so. The Court therefore presumed that she did not know or recognize him and finds that any deficiency in counsel's performance in this respect was not prejudicial.

In order to be entitled to relief, the Petitioner must prove that Counsel was deficient and that he was prejudiced by this deficiency. Here, the Petitioner has failed to prove prejudice. Counsel did not know that Maynard knew the Petitioner or vice versa. Additionally, the Petitioner testified that he did not recognize the juror by sight. Moreover, the Petitioner did not call Maynard as a witness at the post-conviction hearing. Thus, there is no evidence in the record of Maynard saying whether she actually knew or recognized the Petitioner. Furthermore, Maynard endured two rounds of voir dire, one before the trial and one during it, and she remained on the jury. Considering these facts, the Petitioner has failed to prove he was prejudiced by Counsel not raising the issue that one of his jurors allegedly knew him.

2. Sequestered Jury

The Petitioner claims Counsel was ineffective for failing to request that the jury be sequestered. He argues that, because the jurors were not sequestered, they were exposed to publicity about the case and were, therefore, prejudiced against him. Upon hearing the evidence, the trial court found that the Petitioner did not prove prejudice by the lack of jury sequestration:

> The petitioner alleged that counsel did not request sequestration of the jury. He testified that there was radio, television, and newspaper coverage for a week or more. Counsel testified that he recalled media coverage of the case during, not before trial, though, at the time of the offenses, there was some publicity involving composites of the suspect. He did not request sequestration because of the probability that deliberations would begin on Friday, tempting a sequestered jury to rush their decision, and did not recall that there were any potential jurors who were aware of the case. He and the petitioner agree, however, that, near the end of the trial, two jurors heard something about the case on the radio. All the jurors were questioned individually and one was excused. The Court finds that any deficiency in counsel's performance in this respect was not prejudicial.

The Petitioner has failed to prove that Counsel was deficient. In this case, Counsel made a tactical decision to not request that the jury be sequestered. We will not second guess this strategy. *Williams*, 599 S.W2d at 279-80; *House*, 44 S.W.3d at 515. Moreover, when Counsel heard that the jurors received knowledge of the case from outside sources, he was allowed to individually voir dire the jurors. After Counsel asked each juror questions, the trial court also conducted its own voir dire until it was satisfied that no other jurors, other than the one excused, were unduly influenced. Counsel even moved for a mistrial at that point, but the trial court denied it. Further, the Petitioner has failed to show how Counsel's failure to request sequestration prejudiced him.

3. Expert Testimony

The Petitioner claims Counsel was also ineffective for failing to consult experts for the fingerprint and DNA evidence. The trial court found that the Petitioner failed to prove that he was prejudiced by Counsel's decision not to seek expert opinions on fingerprint and DNA evidence:

> The defendant alleges that counsel did not seek expert assistance in the fields of fingerprint and DNA analysis. He testified that there were visible differences between the perpetrator's fingerprints and his own, though the state's expert was able to explain them. He also testified that, according to counsel, the expression of DNA evidence as a probability ratio that was no "one hundred percent" leaves reason for doubt. Counsel testified that he had encountered the state's fingerprint expert before, and because of that encounter, questioned his qualification as an expert at trial. The judge allowed him to question the expert, and counsel learned that, since their prior encounter, the expert had acquired more qualifications. Counsel also testified that he himself had had DNA cases before, and he consulted with other experienced lawyers who had also had DNA cases. He did not consult a DNA expert because he

> did not think he could refute the DNA evidence. Instead, he did considerable research on DNA to prepare for cross-examination and was complimented thereon by the prosecutor(s). In the absence of fingerprint or DNA evidence that contradicts the state's evidence, the Court finds that any deficiency in counsel's performance was not prejudicial.

In order for a petitioner to establish prejudice from his attorney's failure to use a witness at trial, the petitioner must have the witness testify at the post-conviction hearing. *Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). "It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a witness or what that witness' testimony might have been if introduced by defense counsel." *Id.* The Petitioner did not present testimony by a DNA or fingerprint expert to show that, without that testimony, his trial was fundamentally unfair. Moreover, Counsel testified that he made a tactical decision not to hire DNA and fingerprint experts. This court will not question Counsel's legal strategies. *Williams*, 599 S.W2d at 279-80; *House*, 44 S.W.3d at 515. The Petitioner has failed to prove that Counsel was deficient or that he was prejudiced by Counsel's decision not to call expert DNA and fingerprint witnesses.

III. Conclusion

We conclude that the Petitioner failed to prove that the post-conviction court erred when it denied his petition for post-conviction relief. Based on the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

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ROBERT W. WEDEMEYER, JUDGE